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1 aside for a second and talk about your memory and then
 2 maybe we'll come back to this. What do you recollect
 3 after going through those steps you did next in relation
 4 to classifying these positions as exempt or nonexempt?
 5 A I furthered the study and ultimately talked with the State
 6 and came to the conclusion about the positions that I was
 7 concerned about, and -- and made some adjustment to some
 8 of the positions.
 9 Q Okay, and do you recollect which positions and what
 10 adjustments you might've made?
 11 A The one that I ended up telling the superintendents to
 12 change were the warehouse, its foremen and warehousemen.
 13 Q And they got changed from?
 14 A Exempt to nonexempt.
 15 Q All right, and ultimately you reviewed the safety
 16 supervisor and decided not to change that, is that
 17 correct?
 18 A Safety -- I don't know that I....
 19 Q I'm sorry, safety specialist....
 20 Asupervisor....
 21 QI misspoke....
 22 AI did the specialist, yes.
 23 Q Okay, all right. This is an aside, now. Have you ever
 24 done a review of the safety supervisor position from 1996
 25 to today to consider whether or not it ought to be exempt

1 A No.
 2 Q Okay. Besides those reviews have there been any other
 3 reviews -- a more formal review of the position of safety
 4 supervisor for exempt/nonexempt status?
 5 A For me personally? No, I -- I haven't done a more
 6 formal -- has HR -- have we referred a lot of positions or
 7 a lot of questions to our HR department over time to
 8 review? Yes. Is a formal review done at that level, I
 9 don't -- I don't -- I assume so, but I don't know that.
 10 Q Okay. Would HR generally be the party or the section of
 11 the company that would do the review for exempt/nonexempt?
 12 A Well, I think the first step is the hiring official, so
 13 the hiring official should be basically aware of the
 14 exempt versus nonexempt review before they ever hire
 15 somebody so we don't get into the situation they're hired
 16 and then a week or a month or a year down the road we're
 17 trying to change it on them. So it should be the hiring
 18 official. If there's an issue down the road, then we
 19 would involve an HR to make sure we're fair back with the
 20 employee if the rate's changed, or they're reclassified.
 21 Q Okay, coming back to the comment you made earlier about
 22 the contracts you have with the, I take it, ARCO, BP
 23 saying we want a quote for, I think you said, a nonexempt
 24 employee at an exempt rate, is that how you put that?
 25 A They'll come out with a spreadsheet that maybe has --

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1 or nonexempt?
 2 A A review in the sense of a formal review or a mental
 3 process review? Either/or?
 4 Q Either way.
 5 A Yes.
 6 Q All right, and when was that?
 7 A Periodically either a contract -- when we -- When we come
 8 out with a new contract with our clients, the clients in
 9 Alaska, BP, Conoco Phillips, by and large continue to come
 10 out, even after this is gone our figures will continue to
 11 come out and -- and request rates for positions that are
 12 nonexempt to be quoted as a exempt status. So we are
 13 constantly reviewing contractually -- I say constantly,
 14 it's not a daily thing, but when a contract comes out we
 15 will review that. So we also -- it also triggers us to
 16 ask HR a number of times or Chris Boyle's department to
 17 print out -- I don't know if it's every -- twice a year to
 18 a year, but periodically to print out who we have
 19 classified as exempt, so I do -- actually do a personal
 20 review of that with my staff and question is this person --
 21 -- should this person be exempt.
 22 Q Okay, and when you say with your staff, who would that
 23 involve, yourself and?
 24 A My direct reports.
 25 Q Okay. And would that involve Mr. Boyle or not?

1 Let's use plumber, for example. We want a rate for a
 2 plumber. And they'll put the category, day rate, they
 3 want a quote for a day rate. We have to go back and say,
 4 look, plumber is a nonexempt, we can't quote you a day
 5 rate. We can quote you a rate that has all the appearance
 6 of a day rate, but we're going to end up paying this guy
 7 eight and 40 and overtime at this rate, and so we can't
 8 exceed so many hours so we can ask it as a day rate. But
 9 we come -- but for this person or this position is a
 10 nonexempt position. And so we end up negotiating back and
 11 saying, and -- back to that, we can't give you a quote
 12 like that.
 13 Q Okay, because basically for their purposes of bidding a
 14 job or getting a job done they want a hard fixed number to
 15 deal with?
 16 A They want to be able to define their costs, they want to
 17 know if they work a plumber a day it's going to cost them
 18 X. They don't -- they don't -- the way they work is they
 19 don't want to know it's going to be between A and Z, they
 20 want to know X so they can calculate their costs daily.
 21 Q And your problem is to say, well, we're sorry, we can't
 22 give you that number because it's going to depend on the
 23 number of hours the guys works?
 24 A Sure.
 25 Q How do you resolve that? Or do you?

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1	A	We don't quote -- we -- we can't quote. We don't say....	1	Q	Did Mr. Carr also provide you with checklist sheets and
2	Q	Okay, so you put it back in their lap and let them work it	2		information concerning classification of exempt and
3		out, then?	3		nonexempt employees, if you recollect? And I'd also draw
4	A	If you want to take the liability, go for it, but we don't	4		your attention, I guess, to Plaintiff's Exhibit 4, Pages
5		-- we're not willing to do that, sure.	5		184 to 191.
6	Q	All right. Do you ever end up supplying those services	6	A	Are you asking me did Mr. Carr....
7		and then getting a cost-plus reimbursement on them?	7	Q	Did you get these from Mr. Carr, if you recollect?
8	A	The exempt/nonexempt positions?	8	A	I -- I don't recollect.
9	Q	Right. Let's say that you got to have a plumber, so you	9	Q	All right, do you know where you got them? I realize that
10		give them a plumber....	10		sounds redundant, but....
11	A	Right.	11	A	I don't recall.
12	Q	....then does your -- the payment under your contract	12	Q	All right, okay. Did you discuss directly with Mr. Carr
13		vary dependent upon the number of hours the plumbers or	13		the position of safety specialist and whether or not that
14		groups of plumbers worked?	14		ought to be classified as exempt or nonexempt, if you
15	A	Yeah, the vast majority of our contracts are cost-plus, so	15		recall?
16		if the guy works one hour there's a percentage -- well, I	16	A	Yes.
17		should say the contract like Kuparuk that this case has,	17	Q	And did he give you an opinion as to whether or not that
18		or centers around, we supply a plumber and if the cost is	18		ought to be classified exempt or nonexempt or did he --
19		X they reimburse us X. Doesn't matter if it's \$10 or it's	19		or, in the alternative did he give you information as to
20		\$1,000, they reimburse us that actual cost. Then on the	20		how you might do it?
21		side there's a management fee and we bill a management	21		MR. YOUNGMAN: Object, compound question.
22		fee. That breaks the incentive, if you will, of the	22		MR. COVELL: Okay, well, let me ask the first part of the
23		contractor to try and bill more hours, if you will.	23		question, then.
24		There's no -- there's no more incentive for me to bill	24	Q	Did he give you an opinion as to whether or not the safety
25		more hours, say, on a Kuparuk contract. If I bill 10	25		specialist was exempt or nonexempt?

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1		hours for what we did or 100 hours, we make the same	1	A	Yes.
2		profit, if you will, as a -- as a company.	2	Q	And what was that opinion?
3	Q	So you might get -- this is just to help us possibly	3	A	That the safety specialists were exempt, as I had
4		understand. You have a plumber, whether he works eight or	4		described the position to you.
5		12 you might get a percentage of eight hours a day	5	Q	Okay, did you send him a position description?
6		management fee for him whether he works eight or 12, is	6	A	I don't believe so.
7		that....	7	Q	Do you recollect what you told him the position was? Did
8	A	We would get the same -- typically the same management fee	8		you tell him the safety specialist is the eyes and ears of
9		to manage the contract whether there was five plumbers or	9		management, or do you recollect what you told him?
10		100 plumbers.	10	A	I don't really recall the data -- the actual details of
11	Q	Okay.	11		that conversation.
12		REPORTER: Steve Jones?	12	Q	Did you get an opinion letter from Mr. Carr, or a letter,
13	Q	And you had a conversation, you said, with Mr. -- well,	13		something in writing from Mr. Carr indicating that he was
14		with the Department of Labor. Would that have been with	14		expressing that opinion to you and/or APC?
15		Randy Carr, which is indicated by some of these	15	A	No. Regarding safety specialists?
16		letter....	16	Q	Right.
17	A	Yes.	17	A	No.
18	Q	....letters? All right, and how many conversations did	18	Q	Okay, you did get one that concerned a different position,
19		you have with Mr. Carr, if you recollect? Was it one or	19		right?
20		two or three?	20	A	Yes.
21	A	Oh, maybe say on the order of magnitude of, I would guess,	21	Q	The -- is that the materials supervisor, I believe?
22		Four. Four, maybe five.	22	A	Right.
23	Q	Okay, and part of those, I take it, concerned the day rate	23	Q	Okay, why didn't -- and you also sent the materials
24		issue? Or, yes, the day rate issue?	24		supervisor position description to Mr. Carr, right?
25	A	Yes.	25	A	Yes.

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1 Q Why didn't you do the same for the safety specialist?
 2 A At the time this was taking place I had concerns about a
 3 few positions. When I spoke with the safety specialists
 4 or safety supervisors -- and you've got to envision this,
 5 how this works up there. We live and eat and work in the
 6 same camp, so this isn't -- it's not a real formal
 7 setting. I've had meals with Mr. Zuber dozens and dozens
 8 of times, so it's not -- it's not a formal setting. So
 9 the conversation with the -- when I was talking with the
 10 supervisor, at the time Mr. Cannon, I believe was on the
 11 position, these guys, getting information out of them,
 12 and, of course, they ask, why do you want to know, what's
 13 the basis of the question. Well, I'm concerned about
 14 this, you know, I don't know whether you're exempt, you're
 15 nonexempt, what do you do. You know, I know what you do,
 16 work day to day, but help me with this, you know, let's
 17 kind of work through, there -- maybe there's some
 18 spreadsheets at the time, we ticked and tied to -- or,
 19 checked through them. The distinction is when I spoke
 20 with the safety supervisor there was no question in my
 21 mind that he was very professional, wanted to remain
 22 professional, wouldn't even bear of the -- being a
 23 nonexempt, if you will, because of the type of duties and
 24 whatnot, the type of classification. When I spoke with
 25 the materials supervisor and talking with him, it was

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1 virtually the same kind of an interesting conversation,
 2 because they did not want to be thought of as nonexempt.
 3 And so -- but I had -- when I had -- was having the
 4 conversation my alarm bells were going off, I'm thinking,
 5 well, maybe -- I actually think you are nonexempt, by
 6 based on what you're telling me, what I could find out.
 7 And so I asked these materials supervisor for additional
 8 detail around what they did. I really wanted to get more
 9 into it because everything I could come up with just in
 10 the general conversation was, no, you're nonexempt, so I
 11 need more on this information. And so then I asked them
 12 for additional information, which they provided, and may
 13 be in your packet, I don't know, I don't remember.
 14 Q Okay, there's -- I think there might be their job
 15 description in there. All right, but you didn't -- is it
 16 correct to say that you didn't have the same types of
 17 concerns about the safety specialist? You didn't have the
 18 warning bells going off in your head.....
 19 A No.
 20 Qas it were?
 21 A No.
 22 Q Okay, you said you talked to somebody that was, I believe
 23 you said, safety supervisor, who essentially was saying,
 24 yes, I want to be exempt. Do you recollect who that was?
 25 A Well, I don't know that he said the words "I want to be

1 exempt", I am a professional in my trade or my craft.
 2 That person knew mostly -- at the time it was Bob Cannon
 3 was the supervisor.
 4 Q Okay. Did it occur to you to -- okay, let's see, let me
 5 withdraw that. You spoke to Nancy Williams at ARCO about
 6 classification issues, you notified Anne Hippo and the CFO
 7 about your concern of these issues, you spoke to Mr. Carr
 8 on a number of conversations, and based on -- okay, okay.
 9 Spoke to Mr. Carr a number of times. Outside of those
 10 external resources, as it were -- well, and you used these
 11 checklists. Outside of those resources did you use
 12 anything else to make your decision concerning the
 13 classification of safety specialists as exempt? If you
 14 recollect. And I.....
 15 A I don't believe so.
 16 Q And, I mean, you're free to look at these materials
 17 because I think this is all we've got and I think that
 18 covers it. And your recollection.....
 19 A I'll take your word for it.
 20 Q Well, I'm -- you're testifying, not me, so....
 21 MR. YOUNGMAN: Go through the materials.
 22 Q Okay, why don't you go ahead and take a minute to do that.
 23 I'm just.....
 24 A Well, my recollection is no, when I -- when I talked with
 25 the State in my mind that was the highest authority that I

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1 could find, that I could easily talk with and when I spoke
 2 with the State -- And I had met Mr. Carr prior at one of
 3 the seminars, he spoke at a -- some type of an Alaska
 4 legal review kind of -- he does that. I think I had heard
 5 him speak a couple times, I felt very comfortable with
 6 him, his interpretation, he's a -- he's a very open guy,
 7 if you've never talked with him. He's -- he'll pick up
 8 the phone, you call him, he calls you back. My
 9 recollection, a couple conversations with him and I felt
 10 after talking with him I was very comfortable with our
 11 determination and where we were headed. The reason I
 12 asked him for the determination letter for warehouseman,
 13 which -- got you off on a side track there for a second --
 14 was because when I talked with the warehousemen they were
 15 very adamant that they were also professionals in their
 16 tasks. I said, guys, you aren't -- and I got 'em all
 17 together, and you aren't -- not that you're not
 18 professional, you're very professional in what you do, but
 19 you -- I don't believe you meet the criteria. They wanted
 20 to talk with Randy Carr personally. I said, hey, he's a
 21 State employee, you guys can call him. I actually think
 22 one of the supervisors eventually did talk with them. But
 23 when it all came down, I said, look, I asked Mr. Carr
 24 for -- I believe I wrote him a letter, that may be in
 25 there, but I wrote him a letter and said I actually need

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1 you to put it in writing because these guys do not believe
 2 that they don't fit the -- into the exempt category.
 3 Which subsequently came out this letter that he sent me.
 4 Q All right, but you -- in regard to safety specialists you
 5 don't recollect what you told Mr. Carr the safety
 6 specialists did?
 7 A Well, I would -- I would've describe their -- their day to
 8 day duties to Mr. Carr and had a conversation back and
 9 forth, which he offered the -- he actually offered a
 10 verbal opinion about every one. It was really only the
 11 warehousemen that I said, look, I got a problem here with
 12 the morale and the issue of my employees, I need you to
 13 put it in writing because they don't believe it.
 14 Q Let me draw your attention here to -- why don't we look at
 15 Page 163, we see the third or fourth paragraph, depending
 16 on what you do with the bullets, it says, "One of the more
 17 complex areas of", could you read that paragraph for us?
 18 A Want me to read it out loud?
 19 Q Yes, please.
 20 A "One of the more complex areas of the FLSA is its
 21 classification of certain employees as exempt or excluded
 22 from coverage by the overtime requirements of the law. An
 23 employee is presumed to be nonexempt", parentheses,
 24 "covered by the law and entitled to receive overtime pay",
 25 commas, "unless the employee (sic) can show that the

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1 employee's job duties and pay meet certain criteria".
 2 Q Did you review that material when you were doing this
 3 review back in '96, '97? Did you read this paper, 163?
 4 A I -- I'm sure I did, sure.
 5 Q Okay. And you -- and you did read the Forbes article,
 6 which is perhaps -- would you agree, to paraphrase it it
 7 sort of says this area is a quagmire? That a fair way to
 8 characterize that article?
 9 A Don't really recall, I haven't read it recently, but....
 10 Q Okay, well, it's kind of like a watch-out article, isn't
 11 it?
 12 A Oh, sure, that was my -- set my alarm bells off, yes.
 13 Q All right. And then I draw your attention to Page -- I
 14 think it's -- I've probably gone by it here -- 154 and
 15 155. Is that your handwriting on 154?
 16 A Yes.
 17 Q All right, and did you use this checklist to make your
 18 determination concerning -- or, what did you use this
 19 checklist for?
 20 A Checklist was the basis that I went through, I don't know
 21 that I ever truly completed it per se, it's not obviously
 22 formal by any means in the sense that I formalized it or
 23 signed it. It is my handwriting and I did use it to
 24 formulate the basis for classification of our employees.
 25 Q Okay, do you know if you filled this out when you were

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1 talking to Mr. Carr or if you did it at another time, if
 2 you know?
 3 A I don't recall, it was part of the file and it was
 4 something that would've been part of the overall
 5 determination.
 6 Q Okay, you checked off there under administrative test
 7 "performs office or nonmanual work directly related to
 8 management policies or general business operations", and
 9 you checked that. I take it that that means that you felt
 10 that a safety specialist does that, is that so?
 11 A Yes.
 12 Q All right, let me draw your attention to the other set of
 13 checklists, which is Page 166, and up towards the binding
 14 there there's some notations -- well, out here. Is that
 15 your handwriting on the right-hand side of that paper?
 16 A Yes.
 17 Q All right, and that says "directly related to management
 18 policies, this means to affect" with an A "these
 19 policies", slant, "change the"....
 20 A Change them.
 21 Q "Change them, not work with (sic) . . . policies", and
 22 that's to the right of an arrow that comes off of "primary
 23 duty is office or nonmanual work directly related to
 24 management policies or general business operations of the
 25 employer or" the "employer's customers". Do you recollect

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1 making that now?
 2 A It's my writing, so I -- I'm sure I did, yes.
 3 Q And do you know where you got that information from in the
 4 note?
 5 A I can't say verbatim, it -- it could have been from my
 6 discussions with Randy Carr. At the time I viewed him as
 7 the chief specialist, if you will, but I -- I can't say
 8 that.
 9 Q Okay, what duties does a safety specialist have that
 10 affects or changes policy?
 11 A What duties?
 12 Q What does a safety specialist do that fulfills that
 13 requirement as it was to be exempt?
 14 A You mean beyond the -- okay, you're at what does a safety
 15 specialist did that affects policy?
 16 Q Sure, affects policy, yeah.
 17 A Well, the safety specialist is one who -- who actually --
 18 in the oilfield a big piece of our work is safety, right?
 19 So it's a little bit hard to imagine, maybe, if you don't
 20 work, there's a policy for everything, especially back in
 21 '96 when -- when maybe this was going -- but in '96 we
 22 were very light on policy, if you will. Safety
 23 specialists at that time were -- were formulating,
 24 writing, coaching, everything to do with those -- those
 25 policies and procedures that were being formulated at the

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1 time. So when you say affect, to a certain extent writing
 2 them, input, change, were -- how were -- well were they
 3 being implemented, did they work, didn't they work,
 4 there's, I should say, binders on it.

5 Q Okay, so these are policies that safety specialists
 6 generated and then were eventually adopted by APC, is
 7 that....

8 A Yes.

9 Q ...what you're telling me?

10 A Sure.

11 Q All right. And these would be in writing, then? The
 12 policies?

13 A Oh, yeah, yes.

14 Q Who would eventually approve those policies?

15 A The ultimate approver?

16 Q Sure.

17 A At the time would probably be -- there would probably be
 18 more than one approver, but you would likely have the --
 19 because the intent of the policy is that you -- it's not
 20 just to come out with a policy and everybody has to live
 21 with it, you want buy-in. So you get -- you get buy-in
 22 through -- so you get -- if the safety specialist came --
 23 let's say, came up with a procedure or policy, then they
 24 would look for maybe the construction manager or the
 25 superintendent or the operations manager to also approve

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1 these. Typically over a period of time, it's not
 2 something that was done with rubber stamp, bingo, this is
 3 the day, it's done, but over time and the policies and
 4 procedures evolved. They still evolve today, call them
 5 living procedures or living -- whatever you want to call
 6 them. They continue to evolve. A lot of people,
 7 certainly, especially the specialists, can affect those
 8 policies. And do.

9 Q On a day to day basis does a safety specialist affect or
 10 change safety policy?

11 A An -- an established -- well, day to day, I'm not sure --
 12 yes. I mean, day to day if they're out there, the eyes
 13 and the ears of management, and there is a need for a
 14 change or need to be effected, yes, that could -- would
 15 be, likely could be, would be initiated by a safety
 16 specialist.

17 Q Okay, and how -- what would they do to affect change in
 18 policy? And would they call the safety supervisor, would
 19 they write a memo, how mechanically would they go about
 20 doing this?

21 A Maybe if the policy was -- they wanted to affect it, they
 22 could say I don't -- I think this should be changed in
 23 this way, they'd go into the policy, make -- make the
 24 change. I mean, there's lots of mechanisms for it,
 25 because they -- they could take that to, then, the -- the

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1 area or group that they're working with, what do you guys
 2 think. You know, his -- his or her people that work
 3 within that and say what do you think, how does this
 4 affect us. And then is this what we want to do. And then
 5 -- and then get buy-in to maybe the operations manager at
 6 the time, it would go into -- would make the changes to
 7 the policy.

8 Q Would the safety specialist go to the operations manager
 9 with the proposed change in policy or would the safety
 10 supervisor do that?

11 A Typically it would be the specialist would get the buy-in
 12 of the supervisor, or his peer group, the other
 13 specialists. They'd say, what do you guys think, how does
 14 this affect your areas or your work. You know, you're
 15 dealing with people here that it's not a real structure.
 16 They're out working a lot on their own, so they come
 17 back -- they come back, they have certainly some buy-in
 18 from the supervisor, from the operations side and that's
 19 how a policy would get changed or affected. In the time
 20 frame of '96, '97 we were very -- we have very few
 21 policies and procedures, we were really developing a lot
 22 of them. And so there were a lot of policies being
 23 written from -- from scratch, if you will.

24 Q By the time frame of September of '99 to January 2001 was
 25 there much of that activity?

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1 A From -- say -- repeat the question?

2 Q September of '99 to January 2001 was there much activity
 3 of writing, initiating policies?

4 A Well, a lot of policy had been developed. Did we continue
 5 to affect it? Yes. Are we continuing to write even more
 6 detailed policy down to job tasks? Yes.

7 Q When a safety specialist -- and I take it when you said
 8 the specialist would go in and change the policy, what
 9 you're talking about is changing a draft of the policy and
 10 not changing the actual policy, is that so? In other
 11 words, when he starts the task he says, okay, here's a
 12 policy, I -- he might change -- make up a draft and say,
 13 I'd like to see a policy or procedure in this manner.
 14 He's not going in the book and changing the book and
 15 saying we're going to do this now.

16 A Well, if there was an established policy, sure, he can't
 17 go in and just make a change, an arbitrary change, sure.
 18 If there was no policy for it, he could -- he could start
 19 the draft, sure. Let me -- I could use an example maybe
 20 near to Ron in the sense that we started training,
 21 specific -- around specific kind of training. He may have
 22 developed that policy specific to training and buy-in from
 23 his peers, got the buy-in from the supervisor, maybe from
 24 myself at the time, and then if that was what the
 25 specialist said is the policy and we all felt we could buy

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1 into it, then that became the -- the policy, if you will,
 2 and it was rubber stamped.
 3 Q Okay, and as operations manager you'd be involved in that
 4 process?
 5 A Sure, a review of that, yeah. Typically not drafting.
 6 Q All right. Can you tell me what policy or policies Ron
 7 Zuber as a safety specialist affected in the manner we
 8 just described?
 9 A Can I think of....
 10 Q Can you give me any specific examples?
 11 A Ron Zuber, champion of champion trainers, SIMS training,
 12 safety in motion. I mean, out of state, went to out of
 13 state training, was a champ -- what we call a champion
 14 trainer, champion expert. He not only trained in SIMS,
 15 which stands for safety in motion, he trained the trainer,
 16 if you will. He's our -- he's our expert, beyond our
 17 expert. I mean, he is -- he was the guy. Did Ron Zuber
 18 have a tremendous amount of effect, if in fact he didn't
 19 write it? I don't know for a fact, but the APC policy
 20 around SIMS I -- I suspect he had a tremendous amount of
 21 influence, if he didn't write it, over that policy.
 22 Q Okay, so it's your impression, as it were, that he....
 23 A Yeah, I can't say....
 24 Qhe wrote or contributed to the policy?
 25 A Yeah.

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1 Q Okay, any others?
 2 A He would've had to. I mean, you know, he was the guy.
 3 Q Okay. How long was this SIMS training for, do you know?
 4 Was it like 40 hours or five days or two weeks or do you
 5 recollect?
 6 A SIMS training was a series of training. I can't even tell
 7 you the time. I went through it myself years ago, been
 8 through refreshers, but it's not a two-week training, it's
 9 a over the course of a -- over the course of a day,
 10 something like that.
 11 Q Okay, all right. Do you know whether or not -- if there
 12 were procedures implemented in relation to SIMS, if they
 13 were taken essentially wholesale from the training
 14 materials and adopted as an APC procedure?
 15 A I don't know.
 16 Q Okay. Besides the SIMS training being an example of
 17 perhaps where Mr. Zuber might've affected policy do you
 18 have any other examples for us?
 19 A Verbatim to Mr. Zuber, you mean, or....
 20 Q To mister -- sure. For starters....
 21 A No, not -- not -- I don't recall, you know, Ron working a
 22 specific policy and procedure, but I can't relate to any
 23 specific one at some point he did.
 24 Q All right, if he had been involved in doing that to a
 25 substantial degree would there be some kind of paper trail

1 out there that would document it?
 2 A Today?
 3 Q Sure.
 4 A I doubt it. Because the author, author or those who
 5 affect a policy today, there's not a -- you know, at the
 6 bottom of the procedure it doesn't say contributions made
 7 by Mark Nelson. It's not there.
 8 Q We just don't get our names on these papers like we
 9 should?
 10 A No -- no recognition for that type.
 11 Q Okay. Looking back to Page 154, the second factor in the
 12 administrative test says "customarily and regularly
 13 exercises discretion and independent judgment." Can you
 14 tell me what a safety specialist does where they
 15 customarily and regularly exercise discretion and
 16 independent judgment?
 17 A Well, a safety specialist, unlike a lot of jobs, doesn't
 18 have a supervisor who stands over them and says at 6:00
 19 o'clock you will do this, 7:00 o'clock, you'll do that,
 20 you better have this out, you know, by the end of the
 21 week, here's your schedule, here's your time frame. A
 22 safety specialist is very independent in their work, day
 23 to day work, for a large part they're left to their own --
 24 own direction, recognizing what's -- what their tasks
 25 should be on a day to day. And so that's about as close

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1 as I can describe discretion and independent judgment for
 2 you. He -- he was out -- or, in this case Ron was out
 3 really every minute of every day with independent judgment
 4 and discretion.
 5 Q One of the things a safety specialist does is confined
 6 space entry permits, or permitting, I should say, is that
 7 right?
 8 A Sure.
 9 Q Okay. And in doing that one of the tasks is to sniff a
 10 vessel or a tank with a -- some nature of a industrial
 11 hygiene instrument, I guess?
 12 A Sure.
 13 Q Okay. When a safety specialist does that they're checking
 14 for toxic gases, right? Is that what they're checking
 15 for?
 16 A Permissible levels, right.
 17 Q Okay, and in -- if Mr. Zuber were to check a tank, if
 18 there's a permissible level, that criteria for permit
 19 issuance is met, right? I mean, there are other steps. I
 20 assume, in issuing a permit for hot work or confined space
 21 entry.
 22 A Say that again?
 23 Q When you issue a confined space entry permit....
 24 A Yes.
 25 QI assume there's a number of criteria that have to be

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1	met before the permit's issued?	1 A Yes.
2 A	Yes.	2 Q Okay, all right. When a safety specialist is doing his
3 Q	Among them would be sniffing for permissible levels?	3 job he has various policies to refer to to insure that
4 A	Would be one step, sure.	4 work is being done safely, is that correct?
5 Q	and you -- I at least understand in some instances you	5 A Yes.
6	might need to have oxygen tanks for the people going in	6 Q Okay, when you did his review -- I think we pretty much
7	and you might need ventilation and you might need a rope	7 covered this, we talked about the resources you used in
8	to the person going in, is that....	8 doing it, but to beat the dead horse, did you look at or
9 A	Well, I -- yeah, I hope it's not so simple as that, but	9 consult either -- well, did you look at or consult the
10	yes, there's -- there's a tremendous amount of....	10 Code of Federal Regulation that interprets issues such as
11 Q	Okay.	11 what regularly exercises discretion and independent
12 A	....of -- yes, right.	12 judgment means?
13 Q	Right, I don't -- don't expect it's that simple, but for	13 A Not beyond my conversation with Randy Carr, no. I didn't,
14	me to try to digest. But if he were to sniff a tank, if	14 right.
15	it's a permissible level then that particular criteria for	15 Q Okay. Let me read you a portion of 29 CFR 541.207. "The
16	permitting is met and they can go on to the other issues	16 term discretion and independent judgment "as used in the
17	that are -- presented themselves, or needed to be explored	17 regulations of subpart A of this part, moreover, implies
18	to get the permit going, right?	18 that a (sic) person has the authority or power to make an
19 A	They being?	19 independent choice free from immediate direction of
20 Q	Mr. Zuber, the....	20 supervision . . . with respect to matters of
21 A	Yes, then they would -- yes, that's one -- one step, if	21 significance". Then I've got a break in it there, just
22	you will.	22 for the record, moving on to small (b) in parens. "The
23 Q	If the level of gas is higher than a certain standard,	23 term must be applied in the light of all the facts
24	then they can't issue the permit, right?	24 involved in the particular employment situation in which
25 A	Lots of reasons they wouldn't issue a permit. That's one	25 the question arises. It has been most frequently
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1	reason, yes.	1 misunderstood and misapplied by employers and employees of
2 Q	A safety specialist doesn't have any discretion to say,	2 (sic) cases involving the following": colon, "1, confusion
3	well, this gas almost meets the level and therefore in	3 between the exercise of discretion and independent
4	this particular instance I'm going to decide to have the	4 judgment and the use of skill in applying techniques,
5	permit issued, does he? In other words, if the standard	5 procedures or specific standards; and, 2, misapplication
6	is you have to have below a .030 of some molecule in the	6 of the term to employees making decisions relating to
7	tank and you have a .032 or 035, the safety specialist	7 matters of little" importance. And then this is under
8	can't say that's close enough, go ahead?	8 (c)(1), "An employee who merely applies his knowledge in
9 A	Right, the safety specialist -- let's say the permissible	9 following prescribed procedures or determining which
10	level for oxygen is -- boy, whatever, point, whatever, 18	10 procedure to follow, or who determines whether specified
11	or something like that. But that's a no brainer. You or	11 standards are met or whether an object falls into one or
12	I could easily make that determination. That's not where	12 another" -- "one or another of a number of definite
13	we need, in this case, Mr. Zuber's judgment and	13 grades, classes or other categories, with or without the
14	independent thought processes to make that determination.	14 use of testing or measuring devices, is not exercising
15	It's clearly not on the black and white stuff like that,	15 discretion and independent judgment within the meaning of
16	absolutely. If that answers your question.	16 Section 541.2. This is true even if there is some leeway
17 Q	That's not a -- okay, so in instances like that....	17 in reaching a conclusion, as when an acceptable standard
18	REPORTER: This is a suspicious one, can you just....	18 includes a range or a tolerance above or below a specified
19	MR. COVELL: All right, you bet.	19 (sic) standard". If -- in hearing that does that change
20	(OFF THE RECORD)	20 your thoughts about whether or not a safety specialist
21	(ON THE RECORD)	21 exercises independent -- exercised -- regularly exercises
22 Q	Okay, I think we were sniffing tanks before we got on the	22 discretion and independent judgment?
23	telephone. And so in that instance Mr. Zuber's applying	23 A No. You want me to relate that -- I mean, help you with
24	facts to a known standard and has no discretion, is that	24 my -- I just keep -- I'm -- because -- I just want to ask
25	fair to say? That's essentially what you told me, right?	25 you the -- you relate sniffing a tank, right, where we